THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2004-0562, State of New Hampshire v. Dennis Lacasse, the court on October 11, 2005, issued the following order:

The defendant, Dennis Lacasse, appeals his conviction for aggravated felonious sexual assault. We reverse and remand.

The sexual assault allegedly occurred when the victim was six years old. At trial, the victim testified that she disclosed the assault to her aunt in the spring or summer of 2002, when she was sixteen, and that her family called the police in the spring or summer of 2002. The victim's mother also testified that after she was told about the assault, the police were called the same evening. On cross-examination, however, the victim testified that she first spoke to the police in December 2002.

Thereafter, Detective Dunham testified that the assault was not reported to the police until December 2002, and that he interviewed the victim on December 16, 2002. He also testified that during his investigation, he learned that the victim had informed her aunt about the assault during the summer of 2002. Upon redirect examination by the State, Dunham was allowed, over objection, to testify that the victim told him that there had been a delay in reporting the assault to the police because the victim's mother "didn't want her to go forward to the cops."

The defendant argues, among other things, that Dunham's testimony on redirect constituted inadmissible hearsay. The State contends that the defendant opened the door to the admission of this hearsay, and that in any event, the hearsay testimony was admissible pursuant to New Hampshire Rule of Evidence 803(24). On appeal, the defendant has the burden of demonstrating that the trial court's discretionary ruling was clearly untenable or unreasonable to the prejudice of his case. See State v. Trempe, 140 N.H. 95, 98 (1995); State v. Johnson, 145 N.H. 647, 648 (2000).

"'Opening the door' is often used to describe situations in which a misleading advantage may be countered with previously suppressed or otherwise inadmissible evidence." Trempe, 140 N.H. at 98. In this case, the State presented evidence that the victim's family reported the alleged assault to the police the same day that the victim disclosed it to them. The defendant presented evidence to the contrary, showing that the disclosure preceded the report to the police by several months. It appears that if any of this evidence was "misleading," it was the evidence presented by the State, not the defendant. While we do not doubt that the State was entitled to present evidence to explain this delay, we cannot conclude that the defendant "opened the door" to the use of otherwise inadmissible evidence to do so.

The State also argues that Dunham's testimony was admissible under the residual exception to the hearsay rule, which permits the admission of hearsay that is not covered by any of the other exceptions in Rule 803, but that has equivalent circumstantial guarantees of trustworthiness. N.H. R. Ev. 803(24). To be admissible, the statement must also be more probative on the point for which it is offered than any other evidence which the proponent may procure through reasonable efforts. Id.

While we have serious doubts as to whether the victim's unsworn statement to the police had the required equivalent circumstantial guarantees of trustworthiness, see State v. Johnson, 145 N.H. 647, 649 (2000), we need not decide that issue because we conclude that the trial court erred in finding that the statement was more probative than any other evidence which the State could have procured through reasonable efforts. As the prosecutor himself noted at trial, the State could have recalled the victim to address the delay in reporting the alleged assault to the police, but he argued that admitting Dunham's testimony "just keeps it cleaner and simpler." The court indicated that it would allow the State to recall the victim, but also ruled that the statement satisfied the requirements of Rule 803(24). That admission of the hearsay may have been "cleaner and simpler" does not demonstrate that the State could not have procured evidence at least equally as probative from the victim through reasonable efforts. Cf. Simpkins v. Snow, 139 N.H. 735, 739 (1995) (testimony of actual participants to conversation was more probative than third party's testimony of participant's recounting of conversation).

Finally, we disagree with the State's argument that the defendant waived his objection to the admission of this hearsay because he also argued against allowing the victim to be recalled as a witness. The State was not prevented from recalling the victim simply because the defendant objected – indeed, the trial court's ruling after the defendant objected indicated that it would have allowed the State to recall the victim over that objection. Had the trial court sustained the defendant's objection to recalling the victim, the State's argument that it could not have procured other probative evidence might well be stronger, but we see no reason to conclude that the defendant's unsuccessful objection to recalling a witness should result in waiver of his objection to the admission of hearsay.

Because we conclude that the defendant has demonstrated that the admission of this testimony was clearly unreasonable to the prejudice of his case, we reverse and remand.

Reversed and remanded.

NADEAU, DALIANIS and DUGGAN, JJ., concurred.

Eileen Fox,
Clerk